IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-70

DRAKE WILLIAMS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITIONER'S REPLY BRIEF

BERG & ANDROPHY

DAVID H. BERG
* JOEL M. ANDROPHY
KARRIE KEY
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

Attorneys for Petitioner

* Attorney of Record

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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The United States of America filed a brief with this Honorable Court on September 11, 1987. Petitioner offers this reply to Questions Two, Three, Four and Five presented in the brief offered by the United States.

II

PETITIONER'S REPLY TO QUESTIONS TWO, THREE, FOUR AND FIVE

A. Reply To Question Number Two

The United States concedes that there was extensive media covereage when Vance Williams and Silva were placed in custody during the middle of trial. In its analysis

of how this coverage affected Petitioner Drake Williams, the United States ignores what was pointed out in Drake Williams' Petition for Writ of Certiorari: The newspaper coverage continually uses the name "Williams" rather than Vance Williams, and the article says that the gang was *headed by Drake Williams.*

The United States argues this issue does not merit this Court's review because no error is preserved. This is wrong. At trial, Petitioner Drake Williams adopted all motions and objections made by his codefendants. Further, Petitioner Drake Williams filed a motion in the Court of appeals to adopt tthe argument on this point made by codefendant Silva (whose case was reversed). Petitioner's motion to adopt Issue Five (concerning midtrial publicity) of Silva's brief was filed and granted on June 9, 1986. The Fifth Circuit did not issue an opinion until January 29, 1987. There was never any suggestion by the Fifth Circuit or the United States that this was a belated motion. Error was preserved.

The United States does concede that error was possibly preserved, but argues that Petitioner is not entitled to relief because "the publicity about Vance Williams and Oscar Silva's conduct and bail revocation could not have tainted the jury's deliberations on Drake Williams' guilt." In its conclusory analysis, the United States flatly ignores the contents of the front page newspaper article.

Any complete analysis of the harm done to Drake Williams must focus on the contents of the article and the fact that Petitioner Drake Williams is the identical twin of Vance Williams. First, the newspaper article states that the "alleged *gang's* marijuana deals have *continued* even during trial." Second, the article says that the

"*alleged gang* [was] *headed by public accountant Drake Williams.*" (emphasis added). Third, throughout the article, the generic "Williams" is used rather than the name of the individual twin.

The newspaper article prejudiced Petitioner because it reflected upon his guilt or innocence. The tenor of the article is that Drake Williams headed a drug gang, which continued to conduct transactions during the trial. Certainly the statements and general tenor of the article were certainly likely to have influenced the jury on the question of guilt or innocence. *United States v. Manzella,* 782 F.2d 533, 542 (5th Cir. 1986); *United States v. Schrimsher,* 493 F.2d 848 (5th Cir. 1974).

The United States says this is a speculative conclusion. That is not the proper legal analysis of highly prejudicial publicity. Rather, the analysis must center on whether the publicity referred to Petitioner and whether the contents reflected on his guilt or innocence. *Schrimsher,* 443 F.2d at 854. The media coverage in this case did exactly that by referring to Drake Williams as the leader of a gang who continued to conduct transactions during trial. *See ante.*

It is not the place of the United States to determine whether harm inured to the Petitioner. That is the proper role of the Fifth Circuit. The midtrial publicity issue harmed petitioner, just as it harmed Silva, whose conviction was reversed. The Fifth Circuit's refusal to review this error amounts to denial of due process. This Court should use its supervisory powers to remedy this denial and reverse this case or remand it with instructions to consider the midtrial publicity issue and order a new trial.

B. Reply To Question Number Three

Petitioner Drake Williams argues that, in order to avoid juror confusion, his case should have been severed from that of his identical twin Vance Williams. The Government and the Fifth Circuit conclude that no abuse of discretion occurred, relying on their belief that the jury in the trial below could be expected to compartmentalize the evidence as it related to the identical twins, relying on *United States v. Lemm*, 680 F.2d 1193, 1205 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110, 113 S. Ct. 739, 74 L.Ed.2d 960 (1983).

At least three witnesses testified they had trouble distinguishing the twins. However, the Fifth Circuit rested its "no harm" conclusion on the disparate roles played by the twins in the criminal conspiracy. This analysis ignores the testimony of Tim Cassius, the government's primary witness against Petitioner Drake Williams. At trial, Cassius identified Drake as Vance. He then testified that *at the time of the criminal activity* about which he was testifying, he could not distinguish the twins, because they both had beards. (T. Vol. 2, March 28, 1985, pp. 198-150)

The Fifth Circuit's reliance on the disparate role theory in finding no prejudice is belied by the testimony of Tim Cassius. Cassius, the witness who actually testified as to those disparate roles, may not have known which twin he was talking about. When the government's star witness is not sure of his identification of a defendant, surely prejudice accrues. This Court should grant the petition, reverse, and remand to the Fifth Circuit with instructions to order a new trial.

C. Reply To Question Number Four

Petitioner Drake Williams argues that the district court should have severed his case from that of Jan Grossman, whose testimony would have exculpated Petitioner from several drug transactions listed in the indictment. As argued in the Petition for Writ of Certiorari, the Fifth Circuit erred in finding no abuse of discretion, because the motion for severance was in fact supported by an affidavit from Grossman, which met the four requirements of *United States v. Butler,* 611 F.2d 1066, 1071 (5th Cir., 1980), *cert. denied sub nom Fazio v. United States,* 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed.2d 35 (1980).

The United States makes the following disingenuous statement about the Grossman affidavit: " . . . [Petitioner] Williams did not present to the district court an affidavit from Grossman averring that he would take the stand and testify on Williams' behalf if they were tried separately. Although such an affidavit may have been in the record of proceedings transferred from another district . . . petitioner effectively waived reliance on that affidavit by failing to call it to the Court's attention."

The affidavit was transferred to the trial court, but not from another district. As pointed out in the Petition for Writ of Certiorari, the Grossman affidavit was offered during a pretrial hearing before Judge McDonald. When the case was transferred to Judge DeAnda, he accepted into evidence all proceedings before Judge McDonald. (T. January 25, 1985) Most important, when Petitioner's trial counsel *reurged* his motion to sever before Judge DeAnda, he was clearly relying on the Grossman affidavit. (T. January 31, 1985)

Petitioner did not waive reliance on the Grossman affidavit. Trial counsel called it to Judge DeAnda's attention by referring to the attachments filed with the Motion to Sever. (T. January 31, 1985, p. 34) The affidavit was properly entered into evidence in the district court. Presumably, Judge DeAnda had the Court's file containing the motion to sever with the Grossman affidavit.

The petition for writ of certiorari should be granted and this case reversed on the *Butler* issue or, in the alternative, remanded to the Fifth Circuit so that Court may properly consider Petitioner's claim.

D. Reply To Question Number Five

The United States argues to this Court that there is no need to review the Fifth Circuit's treatment of the conduct of the trial judge. Petitioner detailed some of the trial judge's remarks in his petition for writ of certiorari. The Fifth Circuit and the United States reached the conclusion that Petitioner was not denied a fair trial.

How could Petitioner have had a fair trial in light of the following judicial comment: "I doubt he [referring to a witness] would hire Drake Williams to do anything today, counsel" (R. Vol. 18 at 173-174) After counsel protested, the Judge realized his mistake, and he said to the witness: "I thought you said Drake Williams." However, the Judge did not tell the jury to disregard that damning remark until the end of the trial.

Surely the Judge's derogatory remark telegraphed to the jury his contempt for Drake Williams. And just as surely that remark telegraphed to the jury that the

presumption of innocence and the right to a fair trial did not apply to Drake Williams. After this remark, the jury knew the Judge thought Drake Williams was guilty.

The belated instruction to disregard could not cure this judicial misconduct. One would have to live in a dream world to believe that this remark, together with the other derogatory judicial remarks, did not result in prejudicial use of those remarks by the jury. Judge DeAnda has been warned before, but obviously he pays no heed. *See United States v. Carpenter,* 776, F.2d 1291, 1291 (5th Cir. 1985).

As pointed out in the Petition for Writ of Certiorari, the Fifth Circuit used the wrong standard of review in requiring Petitioner to show that he was denied a fair trial by virtue of the Judge's remarks with instructions to order a new trial. This case should be reversed with instructions to order a new trial or remanded for review under the proper standard, because the trial judge's remark denied Petitioner a fair trial.

Respectfully submitted,

BERG & ANDROPHY

By: _____

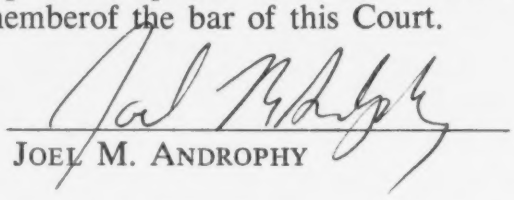
DAVID H. BERG
JOEL M. ANDROPHY
KARRIE KEY
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

Attorneys for Petitioner

III

CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on the 2nd day of October, 1987, three (3) copies of the Petitioner's Reply Brief were mailed, postage prepaid to the Assistant U. S. Attorney Gough at the Federal Bldg., 515 Rusk Street, Houston, Texas 77002 as well as the Solicitor General, Department of Justice, Washington, D.C. 20530. All parties required to be served have been served. I am a memberof the bar of this Court.



JOEL M. ANDROPHY